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WORKMEN'S COMPENSATION ACT—CASES WHERE COMPENSATION NOT ALLOWED.

Section 14 of the Virginia Workmen's Compensation Act (Acts 1918, chap. 400) is as follows:

> "No compensation shall be allowed for an injury or death due to the employee's wilful misconduct, including intentional self-inflicted injury, or growing out of his attempt to injure another, or due to intoxication or wilful failure or refusal to use a safety appliance or perform a duty required by statute, or the wilful breach of any rule or regulation adopted by the employer and approved by the industrial commission, and brought prior to the accident to the knowledge of the employee. The burden of proof shall be upon him who claims an exemption or forfeiture under this section."

WILFUL MISCONDUCT.

As used in the Workmen's Compensation Act "wilful misconduct" means something more than negligence.[1] These words appear in the West Virginia Act,[2] under which it is held that compensation is given for accidental injuries though occasioned by the negligence of the injured employee. Thus the death of a servant by poison, occasioned by his drinking from a bottle a poisonous fluid having the appearance of water, under the impression that it was drinking water, while at work on premises on which the workmen supplied themselves with drinking water from a neighboring well, by means of buckets and bottles, on account of the unsatisfactory condition of the city water furnished in the building by means of pipes, was held such an injury as would entitle the widow to compensation under the Workmen's Compensation Act.[3]

1. Great Western Power Co. *v.* Pillsbury (Cal.), 149 Pac. 35, 40.
2. W. Va. Laws 1913, chap. 10, Code 1913, chap. 15p (§§ 657-711).
3. Archibald *v.* Ott, 77 W. Va. 448, 87 S. E. 791.

The California act also uses the phrase "wilful misconduct." [4] In a recent case in that jurisdiction it appeared that deceased, a miner who had been working in a shaft, was instructed by the foreman to complete his work there and then go to another shaft, where the foreman was located, and work there. He came to the surface after completing his work, and, the day being insufferably hot, stopped temporarily to rest in the shade of an ore bin, a place quite commonly frequented by the men for that purpose. While so resting the bin collapsed and killed him. Word had been carried to the foreman that he had finished his underground labors and was waiting for another assignment to work. The bin was regarded as a safe structure, and no one had ever warned any of the men against resting under it. Under such circumstances it was held that the act of the deceased in making it a place of temporary rest and recuperation was not such "wilful misconduct" as to bar the right of indemnification.[5]

Serious and Wilful Misconduct.—In some of the enactments, as in Massachusetts,[6] the phrase used is "serious and wilful misconduct." It is there held that "serious and wilful misconduct" is a very different thing from negligence, or even from gross negligence, and resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or a bare licensee.[7] And in another case it is said: "Serious and wilful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." [8]

Where decedent, a night watchman, knowing that escaping robbers were near, fired upon two deputy sheriffs, under the mistaken belief that they were the robbers, after they had ordered him to throw up his hands and fired upon him, he was not guilty

4. Cal. Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 283), § 12, subd. 3.

5. Brooklyn Mining Co. *v.* Industrial Accident Commission, 172 Cal. 774, 159 Pac. 162.

6. Mass. St. 1911, c. 751, pt. 2, § 2.

7. In re Nickerson, 218 Mass. 158, 105 N. E. 604.

8. In re Burns, 218 Mass. 8, 105 N. E. 601, 602.

of "serious and wilful misconduct" within the meaning of the Massachusetts act.[9]

Intentional and Wilful Misconduct.—The Michigan act provides that an employee injured by reason of his "intentional and wilful misconduct," shall not receive compensation.[10] Under this statute it is held that though it is clear that an injury was brought about by an employee's own gross negligence, it can not be said as a matter of law that he was guilty of such intentional and wilful misconduct as would defeat his recovery.[11] In another case it appeared that an employee working on the roof of a building about 20 feet high, upon being instructed to come down to lunch, instead of descending by a ladder firmly attached to the side of the building directed a fellow workman to hold one end of a loose rope extending over the edge of the roof about 7 feet, and in coming down by the rope fell and was fatally injured. The court held that the injury was not occasioned by reason of his "intentional and wilful misconduct" within the exception of the statute.[12] And a delivery boy, who caught on the rear end of a motor truck while riding a bicycle, was not guilty of such misconduct.[13]

The "intentional and wilful misconduct" which debars an employee from receiving compensation refers to such misconduct in the scope of his employment; and, if the injury was not received "in the course of his employment," it is immaterial whether it was caused by his "intentional and wilful misconduct." [14]

Intentional Self-Inflicted Injury.

In an action arising under the Kansas act, the admitted facts showed that plaintiff was injured by being caught in the revolv-

9. In re Harbroe, 223 Mass. 139, 111 N. E. 709.

10. Mich. Public Acts, Extra Sess. 1912, No. 10, § 2, pt. 2.

11. Gignac *v.* Studebaker Corporation (Mich.), 152 N. W. 1037, 1038.

In this case an employee was injured while climbing over the bumpers of a freight train to which a live engine was attached, without stopping to see where the trainmen were and without knowing whether the train was about to move.

12. Clem *v.* Chalmers Motor Co., 178 Mich. 340, 144 N. W. 848.

13. Beaudry *v.* Watkins (Mich.), 158 N. W. 16.

14. Bischoff *v.* American Car & Foundry Co. (Mich.), 157 N. W. 34.

ing cylinders of a machine while standing in or upon it and applying compressed air for the purpose of cleaning the cylinders. Covers or hoods were provided for use when the machine was in operation, but in order to clean the machine the covers had to be removed. The plaintiff could have stood on the ground and applied the air without danger of coming in contact with the revolving cylinders. It was held that though the plaintiff was guilty of negligence, he was not barred from the right to recover compensation on the ground that his injury resulted from his deliberate intent to cause the injury.[15]

One who voluntarily takes his own life is guilty of "serious and wilful misconduct" preventing the award of compensation.[16]

INTOXICATION.

Many of the Workmen's Compensation Acts, like the Virginia act, deny compensation where the injury to an employee is occasioned by his intoxication. And where intoxication is not specifically mentioned in the act it is said to be such "serious and wilful misconduct" as will deprive the injured employee of compensation.[17]

Under the Maryland act[18] providing that no compensation shall be paid for an injury due to intoxication, it is held that the right to compensation is cut off by intoxication only if the intoxication was the sole cause of the injury.[19] The court said: "Where, therefore, the intoxication of the injured employee is relied on as a defense, it must be made to appear that the injury—that is to say, the accident which resulted in the injury for which compensation is sought—was caused solely and exclusively by the intoxication of such employee. In other words, the injury for which compensation is required is the 'accidental personal injury' of the employee resulting in his 'disability or death,' except where such injury, or the accident resulting in such injury,

15. Laws 1911, chap. 218; Messick *v.* McEntire, 97 Kan. 813, 156 Pac. 740.

16. In re Von Ette, 223 Mass. 56, 111 N. E. 696, 697.

17. In re Von Ette, 223 Mass. 56, 111 N. E. 696.

18. Md. Acts 1914, c. 800, § 14.

19. American Ice Co. *v.* Fitzhugh, 128 Md. 382, 97 Atl. 999.

is attributable solely and exclusively to 'the intoxication of the injured employee while on the duty.' "

Under the Wisconsin act, making employers liable for injuries to employees except those caused by the employee's "wilful misconduct," it is held that the fact that an employee's injuries were proximately caused by his intoxicated condition does not necessarily defeat the employer's liability, as the drinking of intoxicating liquor is not misconduct in the absence of intention to become dangerously or helplessly intoxicated.[20] In that case the court said: "It is quite possible for a person to be in an intoxicated condition which condition proximately caused the accident which proximately caused the death and yet not be guilty of wilful misconduct. The drinking of intoxicating liquor is wilful in the sense of intentional, but the mere fact of drinking is not misconduct. By section 1561 any person found in any public place in such a state of intoxication as to disturb others, or unable by reason of his condition to care for his own safety or for the safety of others, is guilty of a misdemeanor. This is misconduct and if one intentionally put himself in this condition he might be said to be guilty of wilful misconduct. But there are many cases where although the drinking is intentional the intoxication is not, as for instance where one by reason of fatigue, hunger, sickness, or some abnormal condition becomes intoxicated in consequence of imbibing a quantity of liquor which ordinarily would not so affect him. While intoxication in such case to the degree specified might be a misdemeanor under the statute quoted it is not necessarily wilful misconduct within the compensation act. The intoxication might under such circumstances be the proximate cause of an accident resulting in injury or death and yet not have reached that degree specified in this statute as in case where it produced mere drowsiness."

Under the Michigan act which contains a similar provision, where an employee was severely injured while in the course of his employment, and two days later suffered an attack of delirium tremens, later dying, the fact that his system had been weakened by the use of liquors so that he was unable to with-

20. Wis. St. 1911, §§ 2394-4; Nekoosa-Edwards Paper Co. *v.* Industrial Commission, 154 Wis. 105, 141 N. W. 1013, 1014.

stand the effects of the injury was held not to shift the proximate cause of death from his injury to his intemperate habits.[21]

VIOLATION OF RULES AND ORDERS.

Disobedience of Rules.—Some of the acts, in common with the Virginia statute, specifically deny compensation for injuries due to the wilful breach of the employer's rules and regulations. In those states where it is not so provided it is held that "wilful misconduct" within the meaning of the Workmen's Compensation Act does not include every violation or disregard of a rule of the employer.[22] But a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and, where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of "wilful misconduct." [23] So it was held under the California act that a lineman, killed while working on "hot wires," who disobeyed a known rule against working on such wires without using rubber gloves, and to whom the foreman a short time before the accident had sent up such gloves, was guilty of "wilful misconduct," even though no danger was apparent, as under different conditions he might have escaped injury.[24]

The employee's disobedience of a rule will be excused where it is unreasonable, or where obedience thereto is not practicable, or is unsafe.[25] Where a rule has not been enforced, and its general violation has been acquiesced in by the employer, the question as to whether the injury arose by reason of the "intentional and wilful misconduct" of the employee is eliminated.[26]

21. Ramlow *v.* Moon Lake Ice Co. (Mich.), 158 N. W. 1027.

22. Great Western Power Co. *v.* Pillsbury (Cal.), 149 Pac. 35, 40.

23. Great Western Power Co. *v.* Pillsbury (Cal.), 149 Pac. 35, 40. See Fidelity & Deposit Co. *v.* Industrial Acc. Commission, 171 Cal. 728, 154 Pac. 834, 835.

24. Great Western Power Co. *v.* Pillsbury (Cal.), 149 Pac. 35.

25. Freeman *v.* East Jordan, etc., R. Co. (Mich.), 158 N. W. 204, 206.

26. Rayner *v.* Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, 666. See Freeman *v.* East Jordan, etc., R. Co. (Mich.), 158 N. W. 204.

Where a newspaper company had ceased to enforce rules against employees leaving the composing room during working hours and it appeared that it was the general practice for them to seek air on the roof on hot nights, the dependents of an employee who fell from the roof while seeking fresh air on a hot night were not deprived of compensation for his death.[27]

Disobedience of Orders.—The fact that an injury is occasioned by the employee's disobedience to an order is not decisive against him, so as to deprive him of compensation under the Workmen's Compensation Act. To have that effect, the disobedience must be wilful, or deliberate, not merely a thoughtless act on the spur of the moment.[28] Thus where an employee was ordered to work around a moving shaft during the noon hour while the machinery was stopped, but began work before noon, it was held that his disobedience was a thoughtless act, and not deliberate disobedience.[29]

Violation of Statute.

An employee injured while violating a penal statute is guilty of "wilful misconduct" within the Workmen's Compensation Act. Thus where a statute[30] made it a misdemeanor to drive a motor vehicle on public highways at a rate of speed in excess of 30 miles an hour, an employee killed while driving an automobile at a speed of from 35 to 45 miles an hour was held guilty of "wilful misconduct."[31] The court said: "It matters not, for example, that the evidence is insufficient to establish that such speed was 'unusual according to the usual custom of drivers of automobiles in that vicinity.' That 40 men violate the law and commit crimes is neither justification nor excuse for the forty-first man who does the same thing.

27. In re Von Ette, 223 Mass. 56, 111 N. E. 696.

28. In re Nickerson, 218 Mass. 158, 105 N. E. 604. See Fidelity & Deposit Co. *v.* Industrial Acc. Commission, 171 Cal. 728, 154 Pac. 834.

29. In re Nickerson, 218 Mass. 158, 105 N. E. 604.

30. Cal. Motor Vehicle Act (St. 1913, p. 649), § 22.

31. Fidelity & Deposit Co. *v.* Industrial Acc. Commission, 171 Cal. 728, 154 Pac. 834.

Nor yet does it matter that Head was not afflicted with 'speed mania,' nor that his excessive speed did not 'amount to foolhardiness or dare-deviltry.' Nor is it of the slightest consequence that Head was not violating any rule or order made by his company. Indeed, it would be as remarkable as it would be unnecessary for an employer to give a specific instruction upon a matter completely covered by a penal statute."

Failure to Use Safety Appliance.

In an action under the Kansas act, the admitted facts showed that plaintiff was injured by being caught in the revolving cylinders of a machine while standing in or upon it and applying compressed air for the purpose of cleaning the cylinders. Covers or hoods were provided for use when the machine was in operation, but in order to clean the the machine the covers had to be removed. The plaintiff could have stood on the ground and applied the air without danger of coming in contact with the revolving cylinders. It was held that plaintiff was not barred from the right to recover compensation on the ground that his injury resulted from his wilful failure to use a guard provided for him as protection against accident.[32]

Presumptions and Burden of Proof.

The Maryland act expressly provides that it will be presumed, in the absence of substantial evidence to the contrary, that death did not occur from wilful intention or solely from intoxication.[33] In the absence of such a statutory provision the presumption against crime will raise a presumption against suicide by an employee.[34] And where death occurs under such circumstances that it may or may not have been caused by suicide, it will be presumed to have been unintentional.[35]

On this point the Supreme Court of Wisconsin said: "The

32. Laws 1911, chap. 218; Messick *v.* McEntire, 97 Kan. 813, 156 Pac. 740.

33. American Ice Co. *v.* Fitzhugh, 128 Md. 382, 97 Atl. 999.

34. In re Von Ette, 223 Mass. 56, 111 N. E. 696.

35. Milwaukee Western Fuel Co. *v.* Industrial Commission, 159 Wis. 635, 150 N. Y. 998, 1000.

presumption has the usual legal effect given to presumptions, namely, of calling for proof of the fact which it negatives; that is what is meant when the courts say, as this court said in Sorenson *v.* Menasha Paper Co., 56 Wis. 342, 14 N. W. 446: 'The presumption * * * that the deceased committed suicide cannot be indulged in as a mere presumption, without any fact or circumstance upon which it can be logically predicated, for the presumption of law is in favor of life, and the natural desire and struggle to preserve rather than to destroy it. The presumption is that he (plaintiff's intestate) fell into the hole accidentally, and perhaps carelessly.' These observations were applied in a case brought to recover for the negligent killing of a person while in the employ of the defendant, where there was no direct evidence to show the proximate cause of death. To the same effect is the presumption against suicide in insurance cases, namely, it calls for proof of the fact of suicide, which it negatives. This is because, as stated in the Sorenson Case, in human experience it is the common desire and effort to preserve life rather than destroy it, and hence the law, where a person is found dead, imputes to the circumstances the prima facie significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence. This rule was approved in Johns *v.* Northwestern Relief Association, 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587. The court there states: 'Counsel for the plaintiff is undoubtedly correct in contending that "when the dead body of the insured is found under circumstances, and with such injuries, that the death may have resulted from negligence, accident, or suicide, the presumption is against suicide, as contrary to the general conduct of mankind." May, Ins., § 325. Whether the death is accidental or intentional, whenever there is any evidence bearing upon the point, is a question of fact for the jury or the court. Id. It is only essential that the evidence preponderates against the presumption of accident.' " [36]

In a Michigan case where it appeared that an employee was injured while acting as a "hostler" in cleaning a locomotive, the

36. Milwaukee Western Fuel Co. *v.* Industrial Commission, 159 Wis. 635, 150 N. W. 998, 1000.

burden of proving that the injury was wilful, relieving the employer, who had not accepted the act, from liability was held to rest primarily upon the defendant railroad.[37]

QUESTIONS OF LAW OR FACT.

The existence of "serious and wilful misconduct" under any particular circumstances is usually a question of fact.[38] Where an employee, who died from delirium tremens after an injury, when asked by the attending physician if he was an alcoholic, said he was not, whether there was "intentional or wilful misconduct" in answering such question, and the extent to which he had used intoxicating liquors, were held questions of fact.[39]

Where an employee was injured while cleaning a locomotive from beneath because he did not block the wheels as he had been instructed to do when first employed, and it appeared that if this was a general rule, it had been repeatedly violated in the presence of the master mechanic, it was held that whether the violation of the rule or order was wilful negligence, was a question of fact.[40]

And in the Wisconsin case quoted from under the preceding head, it was said that whether death was due to suicide is a question of fact.[41]

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37. Freeman *v.* East Jordan, etc., R. Co. (Mich.), 158 N. W. 204.
38. In re Nickerson, 218 Mass. 158, 105 N. E. 604.
39. Ramlow *v.* Moon Lake Ice Co. (Mich.), 158 N. W. 1027.
40. Freeman *v.* East Jordan, etc., R. Co. (Mich.), 158 N. W. 204.
41. Milwaukee Western Fuel Co. *v.* Industrial Commission, 159 Wis. 635, 150 N. W. 1000.